NO. 21339

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE JOSEPH,

Petitioner and Appellant,

v.

JOHN H. KLINGER, et al.,

Respondents and Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS

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GEORGE JOSEPH, Petitioner and Appellant, v. JOHN H. KLINGER, et al., Respondents and Appellees.	NO. 21339

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

A. Proceedings in the State Courts

In an information filed by the District Attorney of the County of San Joaquin, appellant was charged with violation of section 23105 of the California Vehicle Code (driving while addicted to or under the influence of narcotics). (Rep. Tr. pp. 6-7.)[1/] Appellant admitted the nine prior felonies charged against him in the information. (Rep. Tr. p. 3.) The jury returned a verdict of guilty. (Rep. Tr. pp. 132-33.) No notice of appeal was filed, timely or otherwise.

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1. References to the reporter's transcript in the state trial court will be as indicated above.

Thereafter appellant filed a petition for writ of error coram nobis in the Superior Court of the State of California, in and for the County of Joaquin, which was denied on July 20, 1965. A petition for writ of habeas corpus was filed in District Court of Appeal of the State of California, Second Appellate District, which was denied on December 7, 1965. (Tr. of Rec. p. 6.)

B. Proceedings in the Federal Courts

On February 18, 1966 appellant filed a petition for writ of habeas corpus in the United States District Court, Central District of California, Leon R. Yankwich, Judge.[2] (Tr. of Rec. p. 3.)

The District Court appointed appellant's present counsel and then denied the petition on August 2, 1966. (Tr. of Rec. p. 35.) A Certificate of Probable Cause to appeal was granted by the District Court and a notice of appeal was filed. (Tr. of Rec. pp. 36-37.)

STATEMENT OF FACTS

During the early morning hours of November 30, 1963, Stockton Police Officers Wingo and Tribble were on routine patrol. At the intersection of Washington and Madison Streets they observed a car pass by at a high rate of speed. (Rep. Tr. pp. 12-13.)[3] The officers pursued the car and observed it

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2. At that time United States District Court Southern District of California, Central Division.

3. No evidentiary hearing was held in the District Court. However, the record of the proceedings in the state trial court was before the District Court and this statement of facts is taken therefrom.

weave back and forth. With the use of the police car's red lights the car was brought to a halt. (Rep. Tr. p. 14.)

Appellant, the driver of the car, got out of his car as the officers got out of the patrol car. Officer Wingo noticed that appellant was unsteady on his feet and his cap was cocked off to one side. (Rep. Tr. p. 15.) Officer Wingo observed that appellant did not appear to be his normal self.[4/]

Officer Wingo smelled appellant's breath but was unable to detect any alcoholic odor.(Rep. Tr. p. 16.) Appellant's arms had puncture wounds which appeared to be those of an addict. (Rep. Tr. pp. 17-19.) Officer Wingo asked appellant if he had taken an injection of narcotics the previous evening. Appellant stated that he had taken such an injection a month or so ago. (Rep. Tr. p. 19.)

The officers then took appellant to the police station for an examination by a physician. (Rep. Tr. p. 19.) Officer Wingo questioned appellant further and he admitted that he had had an injection that night. (Rep. Tr. p. 20.) Officer Roop called Dr. Buckingham to examine appellant.

Mr. Howard W. Roop, a Stockton police officer assigned to the Narcotics Detail, was present in the police station when appellant was brought in. Officer Roop stated to appellant, "Well, it looks like you are really strung out." ("Strung out" means addicted to narcotics.) Appellant made no reply. (Rep. Tr. pp. 73-75.)

Officer Wingo then said to Officer Roop in appellant's

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4. Officer Wingo had numerous conversations with appellant in the past. (Rep. Tr. p. 16.)

presence that "Mr. Joseph, or Joe-Joe had admitted that he had taken a 'fix' earlier that evening." Appellant made no statement at this time. (Rep. Tr. p. 76.)

James H. Buckingham, M.D., received a call during the early morning hours of November 30, 1963, from the Stockton Police Department to come to the police station and examine an individual. (Rep. Tr. pp. 47, 52.) At the station Dr. Buckingham examined appellant's arms. He found in excess of 25 puncture marks on the right arm, at least one of which was less than several hours old. The left arm had approximately 10 puncture wounds over the veins. (Rep. Tr. p. 53.)

Dr. Buckingham asked appellant if he wished to take a "Naline" test and appellant said "No." When he asked appellant if he had used narcotics that night appellant said that he would rather not make a statement. (Rep. Tr. p. 54.) In Dr. Buckingham's opinion appellant was under the influence of a narcotic at the time of his examination and was addicted to narcotics. (Rep. Tr. p. 59.)

APPELLANT'S CONTENTIONS

Appellant contends:

1. That appellant was denied counsel at all times prior to arraignment with the result that inculpatory admissions were admitted into evidence.

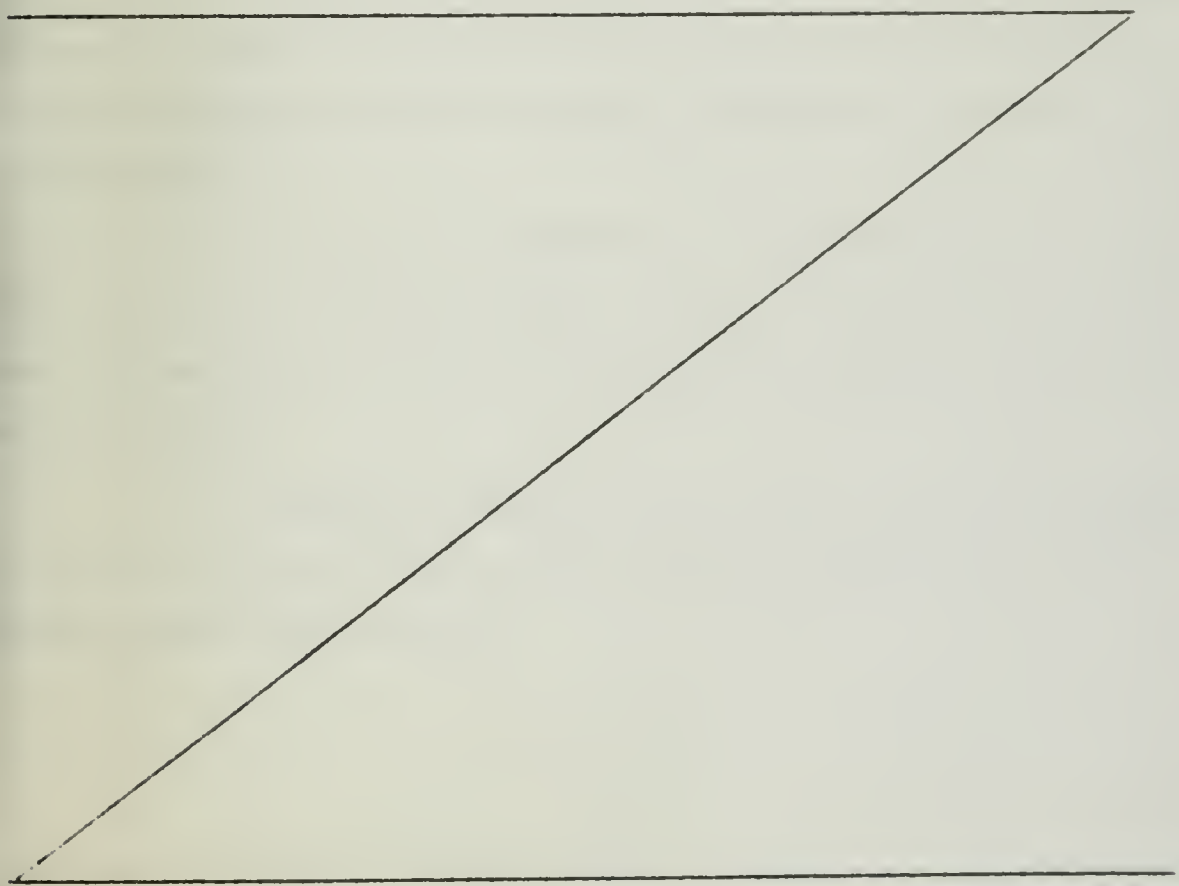
2. That appellant's privilege against self-incrimination was violated by the prosecutor's comment to the jury on appellant's failure to take the stand in his own defense and by the trial court's instructions to the jury on the inferences which could be drawn by the jury from appellant's failure to

take the stand.

3. That appellant was deprived of adequate representation at trial in that his counsel did not advise him of his right to appeal and did not adequately prepare himself for trial so as to be able to provide effective aid of counsel.

4. That conviction and incarceration in the state prison of appellant for driving an automobile while under the influence of narcotics is cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

5. That appellant was deprived of a fair trial in that the trial court failed to give adequate instructions to the jury on what constitutes addiction to narcotic drugs.



SUMMARY OF APPELLEE'S ARGUMENT

1. Appellant's claim as to violations of his right to counsel guaranteed him by the Sixth Amendment of the United States Constitution are barred by the decision of the Supreme Court of the United States in Johnson v. New Jersey, 384 U.S. 719 (1966).

2. Appellant's claim as to violations of his right to remain silent guaranteed him by the Fifth Amendment of the United States Constitution are barred by the decision of the Supreme Court of the United States in Tehan v. Shott, 382 U.S. 406 (1966).

3. Appellant's counsel at trial gave adequate representation and in no manner was appellant deprived of the aid of counsel at trial.

4. The conviction of appellant for driving an automobile while under the influence of narcotics is not cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

5. The court's instructions on the question of addiction while not correct in light of current California law were not so inadequate so as to raise a federal question justiciable in this court.

6. Appellant received a fair trial within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution.

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ARGUMENT

I

APPELLANT'S CLAIM OF VIOLATIONS OF HIS RIGHT TO COUNSEL GUARANTEED HIM BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION MAY NOT BE RAISED ON A COLLATERAL ATTACK AS THE TRIAL COMMENCED BEFORE JUNE 13, 1966

Appellant claims that he was denied his right to counsel in violation of the Sixth Amendment of the United States Constitution. (App. Op. Br. p. 9.) In support thereof he cites Escobedo v. Illinois, 378 U.S. 478 and Miranda v. Arizona, 384 U.S. 436. Appellant concedes that his conviction was final before the decision of Escobedo on June 22, 1964. (App. Op. Br. p. 19.) This brings the case squarely within the rule pronounced in Johnson v. New Jersey, 384 U.S. 719, which held Escobedo to be effective in trials commencing after June 22, 1964 and Miranda to be effective in trials commencing after June 13, 1966.

While appellant criticizes the Supreme Court's non retroactivity cases as being a ". . . mass of contradictions and radical departures from constitutional theory. . ." he is able only to cite Mr. Justice Black's dissenting opinion in Linkletter v. Walker, 381 U.S. 618, 640 as authority for that position.

Appellee, on the other hand relies on the decision of that Court in Johnson v. New Jersey, supra, for its position.

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II

APPELLANT'S CLAIM OF VIOLATION OF HIS RIGHT TO REMAIN SILENT GUARANTEED HIM BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION MAY NOT BE RAISED ON COLLATERAL ATTACK AS THE JUDGMENT WAS FINAL PRIOR TO APRIL 28, 1965, THE DATE OF GRIFFIN v. CALIFORNIA

Appellant contends that his right to remain silent was violated by the prosecutor's argument and the trial court's instructions to the jury commenting on his failure to take the stand in his own defense. (App. Op. Br. p. 13.)

In Tehan v. Shott, 382 U.S. 406, the Supreme Court has refused to give retroactive effect to its decision in Griffin v. California, 380 U.S. 609. We submit that Tehan is controlling on this issue of this case.

III

APPELLANT WAS IN NO MEANS DEPRIVED OF AID OF COUNSEL AT THE TIME OF TRIAL

Appellant next contends that he was deprived of the effective aid of counsel at trial.(App. Op. Br. p. 17.) Appellee contends that the record reveals a vigorous and effective presentation by appellant's trial counsel. As appellant now concedes[5/] his trial counsel did cross examine the witnesses called by the People and then called two witnesses in support of appellant's defense. Contrary to appellant's contention, a brief perusal of the transcript will reveal a vigorous, spirited and imaginative

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5. App. Op. Br. pp. 17-18.

defense conducted by the Public Defender of San Joaquin County.[6] In no way could the trial be said to have been reduced to a "farce or sham," People v. Ibarra, 60 Cal. 2d 460, 464, 34 Cal. Rptr. 863, 866, 386 P2d 487, 490.

Appellant further contends that he was deprived of adequate representation in that his counsel did not advise him of his right to appeal. (App. Op. Br. p. 16.) As argued in the District Court this shows no dereliction of duty on the part of appellant's counsel. In its recent decision in People v. Hatten, 64 Cal. 2d 224, 228; 49 Cal. Rptr. 373, 376; 411 P2d 101, 104, the California Supreme Court stated:

> ". . . It can be argued that an indigent should be entitled to advice of counsel during the period after sentence and before the notice of appeal must be filed. But neither this court, nor the federal courts, have as yet held that, in the absence of a request, the defendant must be advised either by the court or trial counsel of his right to appeal, or of his other rights to review, directly or collaterally, the trial proceedings. . . ."

We submit that appellant was ably represented by his counsel at trial and was found guilty because of the overwhelming evidence of guilt and not because of inadequate representation of counsel.

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6. Cf., People v. Adamson, 34 Cal. 2d 320, 333; 210 P2d 13, 19; People v. Twiggs, 223 Cal. App. 2d 455, 464, 35 Cal. Rptr. 859, 864.

IV

CALIFORNIA VEHICLE CODE SECTION 23105 WHICH PROHIBITS A PERSON FROM DRIVING AN AUTOMOBILE WHILE ADDICTED TO, OR UNDER THE INFLUENCE OF, A NARCOTIC IS CONSTITUTIONAL AND PUNISHMENT FOR VIOLATION THEREOF DOES NOT CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT

Appellant contends that section 23105 of the California Vehicle Code is unconstitutional in that to punish a person for driving while under the influence of, or while addicted to a narcotic is cruel and unusual punishment. (App. Op. Br. p. 23.) That section provides:

> "It is unlawful for any person who is addicted to the use, or under the influence, of narcotic drugs or amphetamine or any derivative thereof to drive a vehicle upon any highway. Any person convicted under this section is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for not less than one year nor more than five years or in the county jail for not less than 90 days nor more than one year or by a fine of not less than two hundred dollars ($200) nor more than five thousand dollars ($5,000) or by both such fine and imprisonment."

Appellant's contention that such punishment is cruel and unusual is two-fold: first, as it is inherently cruel to punish a person for what appellant denominates "non-volitional conduct," and second, the punishment prescribed (up to five years in the state prison) is "cruelly excessive." (App. Op. Br. pp. 26-27.) In support of these contentions appellant cites

Robinson v. California 370 U.S. 660 and Driver v. Hinnant, 356 F2d 761 (4th Cir. 1966).

Appellee contends that punishment for driving a vehicle on a public highway while under the influence of, or addicted to, narcotics is neither cruel nor unusual, and California Vehicle Code section 23105 is constitutional.

In People v. O'Neil, 62 Cal. 2d 748, 753-54, 44 Cal. Rptr. 320, 323, 401 P2d 928, 931, cited by appellant (App. Op. Br. p. 15.), the California Supreme Court upheld the constitutionality of the driving while addicted to narcotics portion of this statute and stated:

> ". . . To deny the privilege of driving to a person who may be subject to the physical infirmities of withdrawal or epilepsy clearly falls within the legitimate confines of the state's police power.[9]"

In the footnote the court stated:

> "[9]For this reason the proscription found in section 23105 does not fall under the holding of Robinson v. California (1962) 370 U.S. 660 [82 S.Ct. 1417, 8 L.Ed.2d 758], which declared unconstitutional that portion of Health and Safety Code, section 11721, which made criminal the status of narcotic addiction. The criminal offense proscribed by section 23105 is the driving of a vehicle, not the condition of addiction. The Legislature's decision to punish as a felon the individual who drives a vehicle while 'under the influence' of a narcotic drug is also clearly

reasonable; such an individual represents a potentially serious hazard to public safety. Medical authority supports the view that a person under the influence of a narcotic drug lacks the full measure of his capabilities; the presence of the drug within his system increases his reaction time, diminishes his perception, and clouds his judgment. While various drugs produce differing effects, the physical manifestations which may be exhibited by persons while under the influence of the more common narcotics are as follows: opiates, morphine, and morphine-like analgesics and barbiturates characteristically induce a somnolent state. (Proceedings, White House Conference of Narcotic and Drug Abuse (1962) pp. 279-285.) Marijuana commonly results in a distortion of the individual's perception of time and space. (Id. at p. 286.) Reports indicate that amphetamines often give rise to hallucinations. (Id. at p. 287.)"

People v. O'Neil, 62 Cal. 2d 748, 753-54, 44 Cal. Rptr. 320, 323, 401 P2d 928, 931.

The decision in Driver v. Hinnant, 356 F2d 761 (4th Cir. 1966) does not support appellant's conclusion herein. California Vehicle Code section 23105 does not prohibit being under the influence of or addicted to a narcotic "in a public place." The danger to the public of a person who appears in public while addicted to or under the influence of a narcotic is relatively minor in comparison to the danger of a person who drives a motor vehicle in such a condition. Nor is the act

of driving an involuntary result of the "disease" of addiction in the same sense that being in a public place while drunk is. Thus it is not inherently cruel to punish a person for driving while under the influence of or addicted to narcotics.

Nor may the term of imprisonment be said to be cruelly excessive in light of the possible dangers to society which result from the operation of a motor vehicle by a person not physically fit to do so. The penalty prescribed by law is imprisonment in the state prison for not less than one nor more than five years or imprisonment in the county jail for not less than 90 days nor more than one year or by a fine of not less than $200 nor more than $5,000 or a combination of fine and imprisonment. California Vehicle Code section 23105.

While in this case appellant was sentenced to the state prison for the term prescribed by law, the court had before it a man who had just suffered his tenth felony conviction. Nine prior convictions had been charged and admitted by appellant. (Rep. Tr. p. 3.) As a ten times convicted felon, appellant has no standing to complain of receiving a state prison sentence in this case, nor may the sentence be characterized as "cruelly excessive." And while the probation officer's report is not in the record, it is presumed to support the judgment of the court. C.f., People v. Walker, 215 Cal. App. 2d 609, 612, 30 Cal. Rptr. 440, 443.

We submit that California Vehicle Code section 23105 is a proper exercise of the state's police power and the punishment prescribed by law is not inherently cruel nor cruelly excessive.

V

AS THE TRIAL COURT'S INSTRUCTIONS ON THE QUESTION OF ADDICTION WERE SUFFICIENT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, THERE IS NO FEDERAL QUESTION ON THIS ISSUE

Appellant contends that the trial judge erred in instructing the jury on the meaning of addiction. (App. Op. Br. p. 15.) Appellee respectfully points out that this is a collateral attack on a judgment rendered on February 28, 1964 and from which no appeal was taken.[7/] At the time of the trial, the trial court properly followed California law in instructing the jury. See People v. Kimbley, 189 Cal. App. 2d 300, 11 Cal. Rptr. 519. More than a year later, on May 21, 1965, the California Supreme Court disapproved Kimbley in People v. O'Neil, 62 Cal. 2d 748, 756, 44 Cal. Rptr. 320, 325, 401 P2d 928, 933.

In addition, the record contains substantial evidence of the fact that appellant was under the influence of narcotics at the time of his arrest. First there was the statement of appellant to Officer Wingo that he had taken an injection of narcotics that night. (Rep. Tr. pp. 20, 33.) Dr. Buckingham testified that appellant was, in his opinion, under the influence of a narcotic at the time of his examination. (Rep. Tr. p. 59.)

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7. It would appear that appellant's failure to seek relief under rule 31(a) California Rules of Court to enable him to file a late appeal would be a failure on his part to exhaust his state remedies. In addition, appellant could have petitioned the California Supreme Court or the Superior Court of the State of California in and for the County of San Luis Obispo for habeas corpus after the California Supreme Court's decision in People v. O'Neil, supra. This would have presented to the state courts the issue of the applicability of the O'Neil rule to final judgments.

At the time of his arrest, appellant had no alcoholic odor on his breath. (Rep. Tr. p. 16.)

The instructions given by the trial court on the question of addiction pursuant to People v. Kimbley, supra, 189 Cal. App. 2d 300, 11 Cal. Rptr. 519, were not so vague so as to violate due process of law. The fact that the California courts later adopted a more stringent definition does not mean that all prior final judgments wherein the old instructions were used are void. Thus, the change in state law standards does not raise any federal question justiciable in this court.

VI

APPELLANT RECEIVED A FAIR TRIAL WITHIN THE MEANING OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Appellant contends that he was deprived of a fair trial within the meaning of the due process clause of the fourteenth amendment of the United States Constitution. (App. Op. Br. p. 9.) Appellant attempts to circumvent the several decisions of the United States Supreme Court dealing with the question of retroactive application of constitutional guarantees by the apparent use of a theory which might best be phrased "accumulated error." Appellee contends that appellant received a fair trial and that the order of the District Court should be affirmed.

Basically the trial produced evidence on these issues: did appellant drive a vehicle on a public highway while addicted to or under the influence of a narcotic? There was evidence that the arresting officer observed appellant's car go by at a high rate of speed. When stopped, appellant was unsteady on

his feet but did not have an alcoholic breath. His arms revealed numerous fresh needle marks. A physician examined appellant and was of the opinion that he was under the influence of a narcotic. In addition there were certain admissions made by appellant.

Appellee contends that in light of such evidence appellant was properly convicted of the crime charged. He was ably represented by competent counsel and in light of his past record of criminality received a just sentence.

CONCLUSION

For the foregoing reasons we respectfully request that the order of the United States District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 19 and 18 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DAVID GOULD

DAVID GOULD